CUSTOMS BULLETIN AND DECISIONS

Weekly Compilation of

Decisions, Rulings, Regulations, and Notices

Concerning Customs and Related Matters of the

U.S. Customs Service

U.S. Court of Appeals for the Federal Circuit

and

U.S. Court of International Trade

VOL. 27 **May 12, 1993** **NO. 19**

This issue contains:

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE

NOTICE

The decisions, rulings, notices and abstracts which are published in the CUSTOMS BULLETIN are subject to correction for typographical or other printing errors. Users may notify the U.S. Customs Service, Office of Logistics Management, Printing and Distribution Branch, Washington, D.C. 20229, of any such errors in order that corrections may be made before the bound volumes are published.

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U.S. Customs Service

Treasury Decision

19 CFR Parts 101 and 122

(T.D. 93–32)

CUSTOMS SERVICE FIELD ORGANIZATION
VICKSBURG, MISSISSIPPI

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final rule.

SUMMARY: This document amends the Customs Regulations governing the Customs Field organization by changing the boundaries of the Port of Vicksburg, Mississippi, which lies within the South Central Region. The current port boundaries are being expanded to encompass the user fee airport at Jackson, Mississippi and the neighboring counties of Hinds, Rankin and Madison. This change is being made to reflect the changing nature of the international trade in the area from the river to the airport. By expanding the port limits, Customs will move into the center of the trade area. Through this change, the public and importers will be better served and Customs personnel and resources will be more efficiently utilized.

EFFECTIVE DATE: June 28, 1993.

FOR FURTHER INFORMATION CONTACT: Bob Jones, Office of Workforce Effectiveness and Development, Office of Inspection and Control, U.S. Customs Service, (202) 927–0456.

SUPPLEMENTARY INFORMATION:

Background

As part of its continuing program to obtain more efficient use of its personnel, facilities and resources, and to provide better service to carriers, importers and the public, Customs is amending § 101.3, Customs Regulations (19 CFR 101.3), to expand the boundaries of the port of Vicksburg, Mississippi, in the South Central Region. The expansion of the port will add the counties of Hinds, Rankin and Madison, in Mississippi to the existing limits which are Warren County in Mississippi and Madison Parish in Louisiana.

The present port of Vicksburg generates little Customs activity. However, the volume of international traffic at the user fee airport at Jackson, Mississippi, which was established in 1989, has become increasingly significant. The facts clearly indicate that the customs activity in the area is not occurring within Vicksburg's present port limits, but rather at the airport and in the neighboring counties which are served by the airport. Accordingly, Customs has determined that the port limits should be expanded to include the three neighboring counties and Jackson International Airport. By including the Jackson International Airport within the limits of the port of entry, Customs will convert the airport's status from a user fee airport to a landing rights airport. It is not anticipated that this change will have any adverse financial impact on either the agency or the community.

COMMENTS

Customs published a Notice of Proposed Rulemaking in the Federal Register on June 16, 1992 (57 FR 26805) which invited the public to comment on this change to the port limits. No comments were received in response to that invitation. Accordingly, the amendment is being published in final as it was proposed. Because the amendment incorporates the Jackson Municipal Airport within the boundaries of the port of entry, it will cease to be a user fee airport. Accordingly, Part 122 of the regulations is also being amended to remove the Jackson Municipal Airport from the list of user fee airports.

The revised port limits are as follows:

> The geographic limits of the port of entry of Vicksburg, Mississippi, comprise all of the territory within Madison Parish, Louisiana, and Warren, Hinds, Rankin and Madison counties, Mississippi.

REGULATORY FLEXIBILITY ACT

This document is not subject to the notice and public procedure requirements of 5 U.S.C. 553 because it relates to agency management and organization. Accordingly, this document is not subject to the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*).

EXECUTIVE ORDER 12291

Because this document relates to agency organization and management, it is not subject to E.O. 12291.

DRAFTING INFORMATION

The principal author of this document was Peter T. Lynch, Regulations Branch, Office of Regulations and Rulings, U.S. Customs Service. However, personnel from other offices participated in its development.

LIST OF SUBJECTS

19 CFR Part 101

Customs duties and inspection, Exports, Imports, Organization and function (Government agencies).

19 CFR Part 122

Airports, Aircraft, Customs duties and inspection, Imports, Drug traffic control, Security measures.

AMENDMENTS TO THE REGULATIONS

Accordingly, Parts 101 and 122 of the Customs Regulations (19 CFR Parts 101 and 122) are amended as set forth below:

PART 101 – GENERAL PROVISIONS

1. The authority citation for part 101 continues to read as follows:

Authority: 5 U.S.C. 301, 19 U.S.C. 2, 66, 1202 (General Note 8, Harmonized Tariff Schedule of the United States), 1623, 1624, unless otherwise noted.

§ 101.3 [Amended]

2. The list of Customs regions, districts and ports of entry in § 101.3(b) is amended in the following manner:

In the South Central Region under the column headed "ports of entry" in the entry for "Vicksburg, Miss." remove "T.D. 84126" and insert "T.D. 93–32".

PART 122 – AIR COMMERCE REGULATIONS

1. The authority citation for Part 122 continues to read as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 58b, 66, 1433, 1436, 1459, 1590, 1594, 1624, 1644; 49 U.S.C. App. 1509.

2. Section 122.15 is amended by removing from the list of user fee airports in subpart (b) the words "Jackson, Mississippi" and "Jackson Municipal Airport".

MICHAEL H. LANE,
Acting Commissioner of Customs.

Approved: April 8, 1993.

JOHN P. SIMPSON,
Deputy Assistant Secretary of the Treasury.

[Published in the Federal Register, April 29, 1993 (58 FR 25933)]

U.S. Customs Service

General Notices

ELECTRONIC DATA INTERCHANGE FOR GLOBAL TRADE

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of conference.

SUMMARY: This document advises the public that the Customs Service is presenting a conference entitled "EDIFACT: Technology For Global Trade" to be held in Dallas, Texas. The primary focus of the conference will be on present and future electronic data interchange applications in the area of international trade. Attendance at the conference is open to the general public.

DATES: The conference will take place on June 2–3, 1993, in the Loews Anatole Hotel, Dallas, Texas. Registration requests for the conference should be received before May 20, 1993.

FOR FURTHER INFORMATION CONTACT: The EDIFACT Conference Hotline (703–440–6587), for information regarding the conference and registration procedures; the Loews Anatole Hotel (214–748–1200), for hotel reservations.

SUPPLEMENTARY INFORMATION:

The rapid expansion of international trade in recent decades, coupled with the concurrent growth in electronic data processing and transmission capabilities, has given rise to the development of electronic data interchange (EDI) as a means for cutting through the jungle of paperwork and thus facilitating the unhindered flow of information which is vital to international trade transactions. EDI, which is defined internationally as "the transfer of structured data by commonly agreed message standards, from computer to computer, by electronic means", enables parties in a national or international commercial transaction to transmit all their documents (for example, invoices, purchase orders, contractual information, and shipping and payment instructions) instantly and directly to the desired location, thereby removing barriers of time and distance and resulting in significant cost savings and increased efficiency. Thus, the ultimate goal of EDI is to facilitate trade by creation of a paperless environment.

In order to realize the long-term objectives of EDI, it has been recognized that common international EDI standards must be developed with regard to data elements, syntax rules and message content. To this end, government and commercial representatives, operating under the auspices of the United Nations, have studied different existing EDI standards with a view to converging them into a single international standard. As a result of these efforts, international agreement has been reached on a converged standard called EDI for Administration, Commerce and Transport (EDIFACT) which has been published by the International Standards Organization as ISO 9735.

The U.S. Customs Service has long been committed to the principle and practice of paperless commercial entry and for this reason has recognized the importance of EDIFACT to global trade in a paperless environment. In furtherance of its pioneering role in the use of EDIFACT, Customs is presenting a conference entitled "EDIFACT: Technology For Global Trade" to be held at the Loews Anatole Hotel in Dallas, Texas, on June 2–3, 1993. The conference is intended to foster an exchange of views and ideas on a variety of complex issues involving international trade, with an emphasis on communications and EDIFACT. Speakers and panelists from industry and various government agencies who are versed in the use of EDIFACT will be featured, as well as individuals who will provide useful information regarding the North American Free Trade Agreement and the Customs Modernization Act.

Attendance at the conference is open to members of the general public at a registration fee of $550 per person, and exhibitors desiring to demonstrate their products or services may do so at a cost of $700 per booth. Since space at the conference may be limited and only a limited number of hotel rooms at a reduced conference rate are available, persons wishing to attend the conference are encouraged to register and obtain their hotel reservations at an early date.

Dated: April 30, 1993.

MICHAEL H. LANE,
Acting Commissioner of Customs.

[Published in the Federal Register, May 6, 1993 (58 FR 27056)]

COPYRIGHT, TRADEMARK, AND TRADE NAME RECORDATIONS

(No. 5–1993)

AGENCY: U.S. Customs Service, Department of the Treasury.

SUMMARY: The copyrights, trademarks, and trade names recorded with the U.S. Customs service during the month of March 1993 follow. The last notice was published in the CUSTOMS BULLETIN on April 21, 1993.

Corrections or information to update files may be sent to U.S. Customs Service, IPR Branch, 1301 Constitution Avenue, N.W., (Franklin Court), Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: John F. Atwood, Chief, Intellectual Property Rights Branch, (202) 482–6960.

Dated: April 25, 1993.

JOHN F. ATWOOD,
Chief,
Intellectual Property Rights Branch.

The lists of recordations follow:

REC NUMBER	EFF DT	EXP DT	NAME OF COP, TMK, TNM OR MSK	OWNER NAME	RES
COP9300078	19930304	20130304	BARKING DOG TREAT JAR	FUN-DAMENTAL TOO, LTD.	N
COP9300079	19930305	20130305	SMART MUSICAL CLOWN BOX ART	DOLLY DOLLS & TOYS FTY., LTD.	N
COP9300080	19930305	20130305	THE NEW GREAT WOK OF CHINA	WESTMINSTER INTERNATIONAL CO.	N
COP9300081	19930305	20130305	WINDOW PORTABLE SPECTRUM ANALYZER CODE V 1.0	COMSONICS, INC.	N
COP9300082	19930305	20130305	FRIENDLY DINOSAUR F619 & F621	WELL-MADE TOYS MANUFACTURING COR	N
COP9300083	19930305	20130305	CLASSIC CHARMPHONE	RAINBOW MERCHANDISE, INC.	N
COP9300084	19930316	20130316	LUI FONG'S EIGHTEEN SONGS	CAPITAL ARTISTS LIMITED	N
COP9300085	19930316	20130316	EXPECTATION OF LAM CHI CHEUNG	WARNER MUSIC HONG KONG	N
COP9300086	19930316	20130313	HULA DOLL	TZU LING, INC.	N
COP9300087	19930316	20130316	REMOTE CONTROL SOFTWARE AND UNIVERSAL DEVICE CODE	UNIVERSAL ELECTRONICS INC.	N
COP9300088	19930325	20130325	B/O GERMAN SHEPHERD 2	IWAYA CORPORATION	N
COP9300089	19930329	20130329	WEDDING RING - STYLE 731LB	ARCH ASSOCIATES, INC.	N
COP9300090	19930329	20130329	DOUBLE WEDDING RING STYLE 731SB	ARCH ASSOCIATES, INC.	N
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TMK9300174	19930301	20010313	TWA	TRANS WORLD AIRLINES, INC.	N
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TMK9300189	19930310	20050129	FRED PERRY AND MISCELLANEOUS DESIGN	FRED PERRY SPORTSWEAR LIMITED	N
TMK9300190	19930310	20050226	FRED PERRY AND MISCELLANEOUS DESIGN	FRED PERRY SPORTSWEAR LIMITED	N
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TMK9300202	19930316	20020804	OGGUN	CENTURY CELLARS, INC.	Y
TMK9300203	19930316	20000703	BOOMERANG CONFIGURATION	ERIC DARNELL	N

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TMK9300206	19930316	20020616	SEGUREX	SCHLAGE LOCK DDE COLOMBIA S.A.	N
TMK9300207	19930316	20020609	SQUIGGLE WIGGLE WRITER	HART ENTERPRISES,	Y
TMK9300208	19930316	20000404	ONE-A-DAY	MILES INC.	N
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TMK9300212	19930322	20021124	LIZ CLAIBORNE AND DESIGN	L.C. LICENSING, INC.	N
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TMK9300218	19930324	20070804	PRECIOUS MOMENTS	PRECIOUS MOMENTS, INCORPORATED	N
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TMK9300220	19930325	19951230	BOURSIN	SOCIETE DE LA FROMAGERIE BOURSIN	N
TMK9300221	19930325	20020728	CLIP-IT	GUARDSMAN PRODUCTS INC.	N
TMK9300222	19930325	20021110	AVIA	AVIA GROUP INTERNATIONAL INC.	Y
TMK9300223	19930329	19971231	LENCO	NLC, INC.	Y
TMK9300224	19930329	20020119	PROPHECY AND DESIGN	KELLWOOD COMPANY	N
TMK9300225	19930329	20030118	SAG HARBOR AND DESIGN	KELLWOOD COMPANY	Y
TMK9300226	19930329	20020908	HD	HARLEY-DAVIDSON, INC.	N
TMK9300227	19930329	20001106	HARLEY-DAVIDSON	HARLEY-DAVIDSON, INC.	N
TMK9300228	19930329	20020901	HARLEY-DAVIDSON AND DESIGN	HARLEY-DAVIDSON, INC.	N
TMK9300229	19930330	20020721	MOTOR CLOTHES	HARLEY-DAVIDSON, INC.	N
TMK9300230	19930330	20010723	EMPORIO ARMANI EXPRESS & DESIGN	G. A. MODEFINE S.A.	N
TMK9300231	19930330	20021020	HARLEY-DAVIDSON AND DESIGN	HARLEY-DAVIDSON, INC.	N
TMK9300232	19930330	20051022	FERRERO ROCHER & DESIGN	FERRERO S.P.A.	N
TMK9300233	19930330	20061104	FERRERO ROCHER & DESIGN	FERRERO S.P.A.	N
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TMK9300235	19930330	20021222	SHIELD DESIGN	HARLEY-DAVIDSON, INC.	N
TMK9300236	19930330	20051228	BLADE GUARD	BUSATIS-WERKE GMBH U. CO. KG.	N
TMK9300237	19930330	20000626	HARLEY-DAVIDSON	HARLEY-DAVIDSON, INC.	N
TMK9300238	19930330	20081220	OS/2	INTERNATIONAL BUSINESS MACHINES	N
TMK9300239	19930330	20020616	HD	HARLEY-DAVIDSON, INC.	N
TMK9300240	19930330	20021103	GRAPHLITE	REEBOK INTERNATIONAL LTD.	N
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TMK9300242	19930330	20021208	STEP REEBOK & DESIGN	REEBOK INTERNATIONAL LTD.	N
TMK9300243	19930330	20021208	STEP REEBOK (STYLIED LETTERING)	REEBOK INTERNATIONAL LTD.	N
TMK9300244	19930330	20021103	BLACKTOP AND DESIGN	REEBOK INTERNATIONAL LTD.	N
TMK9300245	19930330	20021103	BATTLEGROUND	REEBOK INTERNATIONAL LTD.	N
TMK9300246	19930331	20021110	ROYAL COUNTRY LIFE	JACKSON INTERNATIONAL TRADING	N
TMK9300247	19930331	20021201	POD EXPRESS	BANCTEC, INC.	N
TMK9300248	19930331	20020421	VENDETTA	KONAMI INC.	N
TMK9300249	19930331	20020630	SUNSET RIDERS	KONAMI INC.	N
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SUBTOTAL RECORDATION TYPE 79

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U.S. CUSTOMS SERVICE
IPR RECORDATIONS ADDED IN MARCH 1993

PAGE 3
DETAIL

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TNM9300002	19930316	99999999	COAST FOUNDRY & MFG. CO.	COAST FOUNDRY & MFG. CO.	N

SUBTOTAL RECORDATION TYPE 2

TOTAL RECORDATIONS ADDED THIS MONTH 95

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

Chief Judge

Dominick L. DiCarlo

Judges

Gregory W. Carman
Jane A. Restani
Thomas J. Aquilino, Jr.
Nicholas Tsoucalas
R. Kenton Musgrave
Richard W. Goldberg

Senior Judges

James L. Watson

Herbert N. Maletz

Bernard Newman

Samuel M. Rosenstein

Clerk

Joseph E. Lombardi

Decisions of the United States Court of International Trade

(Slip Op. 93–53)

MURATA MFG. CO., LTD. AND MURATA ERIE NORTH AMERICA, INC., PLAINTIFFS *v.* UNITED STATES, DEFENDANT

Court No. 92–03–00208

[Plaintiffs' motion for judgment upon the agency record is denied. Commerce's comparison of home market sales of KMGC104 with U.S. sales of KMGC109A, inclusion of sales of KMGC104 in its calculation of foreign market value, and rejection of Murata's untimely submission of factual information are sustained.]

(Dated April 20, 1993)

Donohue and Donohue (*Joseph F. Donohue, Jr., Kathleen C. Inguaggiato* and *Daniel W. Dowe*), for plaintiffs.

Stuart M. Gerson, Assistant Attorney General, *David M. Cohen*, Director, Civil Division, Commercial Litigation Branch, U.S. Department of Justice (*Marc E. Montalbine*), *David W. Richardson* and *Michelle Behaylo*, Office of the Chief Counsel for Import Administration, United States Department of Commerce, of Counsel, for defendant.

OPINION

CARMAN, *Judge:* Pursuant to Rule 56.1 plaintiffs move for judgment upon the agency record. Plaintiffs challenge *Cellular Mobile Telephones and Subassemblies from Japan; Final Results of Antidumping Duty Administrative Review,* 57 Fed. Reg. 7,728 (1992), issued by the International Trade Administration, U.S. Department of Commerce (Commerce). This action is brought pursuant to section 516A(a)(2) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2) (1988), and pursuant to 28 U.S.C. § 1581(c) (1988).

BACKGROUND

The administrative review which is the subject of this action was initiated on February 19, 1991. *Initiation of Antidumping and Countervailing Duty Administrative Reviews,* 56 Fed. Reg. 6,621 (1991). This review covered the entries of Murata Manufacturing Co., Ltd., for the period December 1, 1989 through November 30, 1990. The imports covered by the review were cellular mobile telephones (CMTs), CMT transceivers, CMT control units, and certain subassemblies thereof. *Cellular Mobile Telephones and Subassemblies from Japan; Preliminary Results of Antidumping Duty Administrative Reviews,* 56 Fed. Reg. 61,400 (1991).

Murata filed a consolidated response to Commerce's questionnaire on June 7, 1991. In its Section B response, entitled "Sales In The Home Market," Murata stated that it had listed its home market sales on a computer tape and that this list did not include sales of samples to purchasers in the home market. Sample sales were listed separately on Exhibit A–5–6 of Murata's questionnaire response. Murata's questionaire response listed six different paired filter models sold in the United States during the period of review along with suggestions for the most similar models sold in the home market. Murata listed model KMGC104 as the paired filter sold in the home market during the period of review which was most similar to model KMGC109A.

On December 3, 1991, Commerce published the preliminary results of its review and reported a margin for Murata of 19.41 percent. *Cellular Mobile Telephones and Subassemblies from Japan; Preliminary Results of Antidumping Duty Administrative Reviews,* 56 Fed. Reg. 61,400 (1991). On December 9, 1991, Murata requested a disclosure conference and hearing regarding the preliminary results.

Murata attempted to submit a case brief to Commerce on January 8, 1992. Commerce rejected this brief on January 31, 1992, indicating that the brief violated 19 C.F.R. § 353.31(a)(ii), because it "contain[ed] factual information regarding sample sales that was not submitted before the date of publication of notice of preliminary results." Pub. Doc. 26. On February 4, 1992, Murata requested Commerce to reconsider its decision and to accept the contested information for the limited purpose of corroborating the fact that a clerical error was made in the home market sales submission. Murata argued that the model KMGC104 sales it had included in its Questionnaire Response were really sample sales which should not have been matched with United States sales in the calculation of the dumping margin. Pub. Doc. 27.

On March 4, 1992, Commerce published its final results of the administrative review. *Cellular Mobile Telephones and Subassemblies from Japan; Final Results of Antidumping Duty Administrative Reviews,* 57 Fed. Reg. 7,728 (1992). In the *Final Results,* Commerce disagreed with Murata's argument that, since model KMGC104 sales were not made in quantities comparable to model KMGC109A sales, model KMGC104 sales should not be used as a basis of comparison with the U.S. model KMGC109A. Commerce also ruled that there was no evidence on the record prior to issuance of the preliminary results supporting the allegation that the KMGC104 sales were sample sales. Commerce stated further that sales are not necessarily samples because they are made in low quantities and at high prices. *Id.* at 7,729–30.

Contentions of the Parties

Plaintiffs argue that Commerce should not have used sales of model KMGC104 as the home market comparison model for United States sales of model KMGC109A for two reasons: (1) model KMGC104 was not sold in comparable quantities to model KMGC109A and (2) model KMGC104 sales were not sold in the ordinary course of trade. Plaintiffs

contend that the use of model KMGC104 violates the antidumping law, because 19 U.S.C. § 1677b precludes the use of sales outside the ordinary course of trade in determining foreign market value. Plaintiffs point to the existence of small quantity/high price sales as sufficient to suggest that these sales were outside the ordinary course of trade. Plaintiffs further argue that Commerce erroneously concluded that information submitted by Murata to corroborate the occurrence of a clerical error, must be rejected. Murata claims that this clerical error resulted in the failure of model KMGC104 sales being properly labelled as sample sales.

Commerce claims that it properly compared sales of model KMGC104 with sales of model KMGC109A since it used the home sales of the model that Murata listed in its Questionnaire Response as the most suitable match for U.S. sales of KMGC109A. Commerce contends that there is insufficient information on the record to support Murata's claim that the sales of KMGC104 were not made in the ordinary course of trade. Commerce argues that it acted within its discretion in rejecting the factual information that Murata attempted to submit on January 8, 1992, as the submission was outside the time limits provided in 19 C.F.R. § 353.31(a)(1)(ii).

Standard of Review

The standard of review in this action is whether the final results are supported by substantial evidence on the record and are otherwise in accordance with law. 19 U.S.C. § 1516a(b)(1)(B) (1988). "Substantial evidence is something more than a 'mere scintilla,' and must be enough reasonably to support a conclusion." *Ceramica Regiomontana, S.A. v. United States,* 10 CIT 399, 405, 636 F. Supp. 961, 966 (1986), *aff'd,* 5 Fed. Cir. (T) 77, 810 F.2d 1137 (1987) (citations omitted). "In addition, ITA's interpretation of the statute it administers must be reasonable and must not conflict with Congressional intent." *Floral Trade Council v. United States,* 15 CIT ____, ____, 775 F. Supp. 1492, 1495 (1991).

Discussion

This Court has stated that "fair and accurate determinations are fundamental to the proper administration of our dumping laws" and that "courts have uniformly authorized the correction of any clerical errors which would affect the accuracy of a determination." *NSK Ltd. and NSK Corp. v. United States,* 16 CIT ____, ____, 798 F. Supp. 721, 724 (1992), citing *Koyo Seiko Co. v. United States,* 14 CIT 680, 682, 746 F. Supp. 1108, 1110 (1990). This Court has also noted that "Congress intended final determinations to be precisely that. Indeed, if determinations were constantly subject to amendment, 'it would be difficult to answer the question as to when a *final* determination would ever be made.'" *Koyo Seiko,* 14 CIT at 682, 746 F. Supp. at 1110 (citation omitted) (emphasis in original). Furthermore, this Court has recognized that "[p]laintiffs must prepare their own data accurately. They cannot ex-

pect Commerce to be a surrogate to guarantee all of their submissions are correct." *Sugiyama Chain Co., Ltd. et al. v. United States,* 16 CIT ___, ___, 797 F. Supp. 989, 995 (1992).

In determining foreign market value, Commerce is required by 19 U.S.C. § 1677b (1988) to look at the price at which "such or similar merchandise" is sold in the principal markets of the country from which the merchandise is exported. The term "such or similar merchandise" is defined in 19 U.S.C. § 1677(16) (1988). This statute provides:

> The term "such or similar merchandise" means merchandise in the first of the following categories in respect of which a determination for the purposes of part II of this subtitle can be satisfactorily made:
>
> (A) The merchandise which is the subject of an investigation and other merchandise which is identical in physical characteristics with, and was produced in the same country by the same person as, that merchandise.
>
> (B) Merchandise –
>
> (i) produced in the same country and by the same person as the merchandise which is the subject of the investigation,
>
> (ii) like that merchandise in component material or materials and in the purposes for which used, and
>
> (iii) approximately equal in commercial value to that merchandise.
>
> (C) Merchandise –
>
> (i) produced in the same country and by the same person and of the same general class or kind as the merchandise which is the subject of the investigation,
>
> (ii) like that merchandise in the purposes for which used, and
>
> (iii) which the administering authority determines may reasonably be compared with that merchandise.

Plaintiff does not dispute that KMGC104 is such or similar merchandise with respect to KMGC109A. Although neither model KMGC104 nor KMGC106 is identical to model KMGC109A, both are identical to each other in physical dimensions, and costs of manufacture (product cost), and virtually identical in electrical specifications. In fact, Murata listed model KMGC104 as the paired filter sold in the home market during the period of review which was most similar to model KMGC109A sold in the United States. Paired filter model KMGC106 was listed by Murata as its second choice home market model. Murata now claims that despite providing Commerce with a list of home market sales which "include[d] all sales of the merchandise under consideration *except sales of samples* to purchasers in the home market," (emphasis added) and despite pointing to KMGC104 as the most similar model, that in fact KMGC104 was a sample and should not be considered.

Plaintiff bears the burden of proving whether sales used in Commerce's calculations are outside the ordinary course of trade. *Nachi-Fujikoshi Corp. and Nachi Am., Inc. v. United States,* 16 CIT ___, ___, 798 F. Supp. 716, 718 (1992). The only information on the administrative record to which Murata points concerning its claim that the sales of

KMGC104 were not in the ordinary course of trade is that sales of model KMGC104 were generally made in smaller quantities and at higher prices than sales of model KMGC106. However, this information alone is insufficient to establish that the sales of KMGC104 were not made in the ordinary course of trade. As stated by Commerce in the final results, "[t]here is no evidence on the record prior to the issuance of [the] preliminary results that supports [Murata's] allegations of certain home market sales being samples." Final Results, 57 Fed. Reg. at 7730.

Furthermore, the administrative determinations cited by Murata do not support the proposition that the presence of low quantities and high prices by themselves indicate that a sale is outside the ordinary course of trade. One determination cited by Murata excluded the sample sales of two companies, Koyo and NTN. *Tapered Roller Bearings, Finished and Unfinished, and Parts Thereof, From Japan, Final Results of Antidumping Duty Administrative Review,* 57 Fed. Reg. 4,951 (1992). The exclusion of certain of Koyo's sales was based on an examination of "Koyo's sales practices with respect to sample sales at the verification for the 1987/1988 review and [the determination] that the prices of samples were negotiated separately from the standard price agreements." *Id.* at 4,958–59. Similarly the exclusion of NTN's sales was not based on the presence of small quantity/high price sales alone, but rather on a determination that the transactions in question were "comprised of trial sales for evaluation by customers, sales of sample merchandise, and sales of very small quantities on a spot basis in unusual circumstances." *Id.* at 4,959. Murata cites another determination in support of its argument: *Final Determination of Sales at Less Than Fair Value, Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, from Japan,* 52 Fed. Reg. 30,700 (1987). Once again the determination to exclude sales was not based solely on the presence of small quantity/high price sales, but on that fact in combination with other circumstances such as the fact that most of the sales were later cancelled before the merchandise was invoiced to the purchaser. *Id.* at 30,704.

The Department of Commerce explicitly addressed the small quantity/high price sales issue that Murata raised in *Certain Welded Carbon Steel Standard Pipes and Tubes from India, Final Results of Antidumping Duty Administrative Reviews,* 56 Fed. Reg. 64,753 (1991). The Department stated its position as follows: "The Department, in determining whether home-market sales are in the ordinary course of trade, does not rely on one factor taken in isolation but rather considers all the circumstances particular to the sales in question." *Id.* at 64,755. The Department more specifically addressed the issue by stating that "the number of sales or volume sold are not in and of themselves definitive factors in determining whether the sales in question are in the ordinary course of trade." *Id.*

Murata further argues that sales of KMGC104 should not have been matched with U.S. sales of KMGC109A because they were not sold in comparable quantities as is required by 19 C.F.R. § 353.55(a) (1992). This section reads as follows:

> (a) *In general.* In comparing the United States price with foreign market value, *the Secretary normally will use sales of comparable quantities of merchandise.* The Secretary will make a reasonable allowance for any difference in quantities, to the extent that the Secretary is satisfied that the amount of any price differential is wholly or partly due to that difference in quantities. In making the allowance, the Secretary will consider, among other things, the practice of the industry in the relevant country with respect to affording quantity discounts to those which purchase in the ordinary course of trade.

(Emphasis added). "Comparable" is broadly defined as "capable of being compared." *Webster's Third New International Dictionary* 461 (1986). This section does not state that Commerce will *always* use sales of *numerically equivalent* quantities of merchandise when making comparisons. Rather it reads that Commerce "*normally* will use sales of *comparable quantities* of merchandise." (Emphasis added). The requirement of comparability in 19 C.F.R. § 353.55(a) is present to insure that a difference in quantity does not cause a price differential between the items sold in the home market and those sold in the United States, a problem which is not raised by Murata. Commerce appropriately selected KMGC104 as a match for sales of KMGC109A and did not violate 19 C.F.R. § 353.55(a).

Plaintiff must bear its burden by proving that the sales used in Commerce's calculation are outside the ordinary course of trade and it must satisfy this burden by providing the information to Commerce in a timely fashion in accordance with 19 C.F.R. § 353.31(a)(1)(ii) (1992). The administrative record reflects (and plaintiffs concede) that Murata's unsolicited factual information was submitted outside the time limits provided in 19 C.F.R. § 353.31(a)(1)(ii). However, plaintiffs contend that the information, and the circumstances under which it was filed, was not the type intended to be precluded by the regulation. Murata argues that its submission was not an unsolicited questionnaire response, but was instead intended to corroborate Murata's explanation that it had made a clerical error in preparing the response. This distinction is without merit. Murata submitted additional information to support its position that the home market sales of KMGC104 should be classified as sample sales. Such additional information is of the type intended to be covered by 19 C.F.R. § 353.31(a)(1)(ii). Commerce thus acted within its discretion in rejecting the untimely information that Murata submitted.

This Court is not unmindful that to the plaintiffs the result in this case may seem harsh. Nevertheless, as pointed out in *Sugiyama Chain,* plaintiffs must submit accurate data. They cannot expect Commerce, with its limited resources, to serve as a surrogate to guarantee the cor-

rectness of submissions. *Sugiyama Chain Co., Ltd. et al. v. United States*, 16 CIT ___, ___, 797 F. Supp. 989, 995, (1992). Commerce cannot reasonably be expected to know the affairs of sophisticated importing plaintiffs better than plaintiffs know such affairs themselves. Lastly, it occurs to this Court, were the rule otherwise, some plaintiffs might endeavor to disrupt administrative proceedings by improperly seeking to manipulate data to secure Machiavellian style ends.

CONCLUSION

This Court holds that Commerce's (1) comparison of home market sales of KMGC104 with U.S. sales of KMGC109A, (2) inclusion of sales of KMGC104 in its calculation of foreign market value, and (3) rejection of Murata's untimely submission of factual information were reasonable, supported by substantial evidence on the record, and in accordance with law. Therefore, the final results are sustained and this action is dismissed.

(Slip Op. 93–54)

GMN GEORG MULLER NURNBERG AG, PLAINTIFF *v.* UNITED STATES, DEFENDANT, AND TORRINGTON CO. AND FEDERAL-MOGUL CORP., DEFENDANT-INTERVENORS

Court No. 91–08–00583

Plaintiff moves pursuant to Rule 56.1 of the Rules of this Court for partial judgment on the agency record as to Count 13C of their complaint claiming that the Department of Commerce, International Trade Administration's ("Commerce") proposed assessment rate methodology for exporter's sales price sales is contrary to law and not supported by substantial evidence on the record.

Held: Plaintiff's motion is denied as Commerce's methodology was reasonable and in accordance with law.

[Plaintiff's motion denied; case dismissed.]

(Dated April 20, 1993)

Grunfeld, Desiderio, Lebowitz & Silverman (*Bruce M. Mitchell, David L. Simon* and *Philip S. Gallas*) for plaintiff.

Stuart E. Schiffer, Acting Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Velta A. Melnbrencis*); of counsel: *Dean A. Pinkert*, Attorney-Advisor, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, for defendant.

Stewart and Stewart (*Eugene L. Stewart, Terence P. Stewart, Wesley K. Caine* and *Myron A. Brilliant*) for defendant-intervenor The Torrington Company.

Frederick L. Ikenson, P.C. (*Frederick L. Ikenson, J. Eric Nissley, Larry Hampel* and *Joseph A. Perna, V*) for defendant-intervenor Federal-Mogul Corporation.

OPINION

TSOUCALAS, *Judge:* Plaintiff, GMN Georg Muller Nurnberg AG ("GMN"), moves pursuant to Rule 56.1 of the Rules of this Court for partial judgment on the agency record as to Count 13C of its complaint claiming that the Department of Commerce, International Trade Administration's ("ITA" or "Commerce") proposed assessment rate methodology for exporter's sales price ("ESP") sales is contrary to law and not supported by substantial evidence on the record.

The administrative determination under review is the ITA's final results in *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From the Federal Republic of Germany; Final Results of Antidumping Duty Administrative Review* ("*Final Results*"), 56 Fed. Reg. 31,692 (1991).

BACKGROUND

On June 11, 1990, the ITA initiated an administrative review of ball bearings, cylindrical roller bearings, spherical plain bearings and parts thereof from Germany. *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From the Federal Republic of Germany, France, Italy, Japan, Romania, Singapore, Sweden, Thailand and the United Kingdom Initiation of Antidumping Administrative Reviews,* 55 Fed. Reg. 23,575 (1990). GMN participated in this review. *Id.*

On March 15, 1991, the ITA published its preliminary determination in the administrative review. *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof from the Federal Republic of Germany; Preliminary Results of Antidumping Duty Administrative Reviews and Partial Termination of Administrative Reviews,* 56 Fed. Reg. 11,200 (1991).

On July 11, 1991, the ITA published its Final Results in this proceeding. *Final Results,* 56 Fed. Reg. at 31,692.

DISCUSSION

In reviewing a final determination of Commerce, this Court must uphold that determination unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B) (1988). Substantial evidence has been defined as being "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. NLRB,* 340 U.S. 474, 477 (1951) (quoting *Consolidated Edison Co. v. NLRB,* 305 U.S. 197, 229 (1938)). It is "not within the Court's domain either to weigh the adequate quality or quantity of the evidence for sufficiency or to reject a finding on grounds of a differing interpretation of the record." *The Timken Co. v. United States,* 12 CIT 955, 962, 699 F. Supp. 300, 306 (1988), *aff'd,* 894 F.2d 385 (Fed. Cir. 1990).

In this case, plaintiff contests Commerce's method of calculating the antidumping duty assessment rate for ESP transactions. In its investigation, Commerce employed separate methodologies for exporter sales price and purchase price transactions in order to arrive at appropriate assessment rates.

For ESP sales, Commerce divided the total potential uncollected dumping duties ("PUDD") by the total entered value of those reviewed sales for each importer. Because of the enormous volume of ESP transactions, Commerce sampled the transactions of each company with more than 2,000 such transactions. *Final Results,* 56 Fed. Reg. at 31,698–99. From this sample, a PUDD was derived for each company. Commerce stated that "[a]lthough this approach will result in the assessment of a dumping margin based, to some extent, on sales of merchandise imported outside the [period of review], it is the most accurate rate that can be calculated on the basis of the information on the record." *Id.* at 31,694.

Plaintiff claims that the "better" way for Commerce to have acted would have been for it to calculate the assessment rates based on the ratio of *total* dumping duties owed to the total entered value of the subject merchandise during the period of review. Commerce, however, could not have followed this method for two reasons. First, Commerce was unaware of the size of the universe from which the sample was drawn. Second, Commerce did not have information about the total entered value of units entered during the review period. Thus, Commerce was forced to use sampling techniques and use the sales data they had.

It is well-established that Commerce is granted flexibility in selecting the appropriate methodology. *ICC Indus., Inc. v. United States,* 812 F.2d 694, 699 (Fed. Cir. 1987); *Consumer Prod. Div., SCM Corp. v. Silver Reed America, Inc.,* 753 F.2d 1033, 1039 (Fed. Cir. 1985). As long as Commerce's "decision is reasonable, then Commerce has acted within its authority even if another alternative is more reasonable." *See Koyo Seiko Co. v. United States,* 16 CIT ____, ____, 796 F. Supp. 517, 523 (1992).

In this case Commerce's methodology was a reasonable means of achieving the end result. *Id.* Therefore, Commerce's actions were justified and in accordance with law.

(Slip Op. 93–55)

GENERAL ELECTRIC CO., PLAINTIFF *v.* UNITED STATES, DEFENDANT, AND TORRINGTON CO. AND FEDERAL-MOGUL CORP., DEFENDANT-INTERVENORS

Court No. 91–08–00588

Plaintiff, General Electric Company ("GE"), moves pursuant to rules 1 and 7 of the Rules of this Court for a second remand in this case alleging that the Department of Commerce, International Trade Administration ("ITA"), incorrectly continued to use sales from outside the period of review in calculating antidumping duties to be assessed against GE's imports of antifriction bearings.

Held: GE supplied the ITA with substantial evidence that the sales at issue occurred outside of the period of review and should not have been included in the calculation of the antidumping duty assessment rate for GE's entries.

[Plaintiff's motion for a second remand granted; defendant-intervenor The Torrington Company's motion to affirm remand results denied; case remanded to ITA.]

(Dated April 21, 1993)

McKenna & Cuneo (*Peter Buck Feller* and *Lawrence J. Bogard*) for plaintiff.

Stuart E. Schiffer, Acting Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Velta A. Melnbrencis*); of counsel: *Stephen J. Claeys*, Attorney-Advisor, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, for defendant.

Stewart and Stewart (*Eugene L. Stewart, Terence P. Stewart, James R. Cannon, Jr., Geert De Prest, Christopher J. Callahan* and *John M. Breen*) for The Torrington Company.

Frederick L. Ikenson, P.C. (*Frederick L. Ikenson, J. Eric Nissley* and *Joseph A. Perna, V*) for Federal-Mogul Corporation.

OPINION

TSOUCALAS, *Judge:* The administrative determination under review in this proceeding is the Department of Commerce, International Trade Administration's ("ITA") *Results Pursuant to Court Remand of Antifriction Bearings from Japan, General Electric Company v. United States, Remand, Court No. 91–08–00588 September 29, 1992* ("*Remand Results*"). Plaintiff, General Electric Company ("GE"), moves pursuant to Rules 1 and 7 of the Rules of this Court for a second remand in this case alleging that the ITA incorrectly continued to use sales from outside the period of review in calculating antidumping duties to be assessed against GE's imports of antifriction bearings ("AFBs"). *Plaintiff's Memorandum in Opposition to Remand Results* ("*Plaintiff's Memorandum*").

Defendant states that "[a]fter further review of the information submitted by plaintiff, Commerce agrees that the eight sales identified by plaintiff occurred before the period of review, and that the case should be remanded to Commerce for exclusion of the eight sales from the calculation of plaintiff's antidumping duties and recalculation of the antidumping duties." *Defendant's Response to Plaintiff's Motion for a Second Remand* ("*Defendant's Response*") at 1–2.

Defendant-intervenor The Torrington Company ("Torrington") opposes plaintiff's motion for a second remand and has filed a motion of its own requesting this Court to affirm the remand results filed on January 5, 1993 by the ITA with this Court. *Response of The Torrington*

Company to GE Memorandum in Opposition to Remand Results ("*Torrington's Opposition*") at 2–10; *Motion of The Torrington Company for Entry of Judgment Affirming Remand Results.* GE opposes Torrington's motion to affirm the remand results. *Plaintiff's Opposition to Motion of Torrington Company for Judgment Affirming Remand Results.*

Defendant-intervenor Federal-Mogul Corporation has not responded to these motions.

A complete description of the issues and background of this case is presented at *General Elec. Co. v. United States,* 16 CIT ____, 802 F. Supp. 474 (1992), familiarity with which is presumed. The central issue now before this Court is whether upon remand GE presented substantial evidence to the ITA which shows that certain AFB sales occurred outside the period of review and therefore should not have been used-in assessing dumping duties on GE's entries of AFBs from Japan made during the period of review.

In order to calculate the actual amount of antidumping duties to be assessed on imports of AFBs, the ITA requests each respondent to report the date of sale for each sale of AFBs within the period of review. In this administrative review, the period of review was from November 9, 1988 to April 30, 1990. *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From Japan; Final Results of Antidumping Duty Administrative Reviews,* 56 Fed. Reg. 31,754 (1991).

In the questionnaire sent by the ITA to each respondent the ITA defined the date of sale as

> typically the purchase order date, the contract date, or, where written confirmation is given, the order confirmation date (*i.e., the point in the transaction where the basic terms of the contract particularly price and quantity, are agreed to by the parties involved*). In the case of a long-term contract or a "requirements" contract, the date of sale is the date of the contract. If terms of sale are subject to change, *and do in fact change,* up to, or even subsequent to, the date of shipment, then the date of the agreement to the new terms of sale or the date of shipment may be the appropriate date of sale.

Administrative Record Japan Public Doc. ("AR Japan Pub. Doc.") 39 (emphasis added).

The ITA has consistently considered the date of sale to be the date upon which all material terms of the contract for sale are set, especially price and quantity. Even in situations where a material term is indefinite, the ITA will consider the date of sale to be the date of the contract if the contract provides a mechanism outside of the parties control which sets the indefinite term. This definition of date of sale has been upheld by the United States Court of Customs and Patent Appeals, predecessor to the Court of Appeals for the Federal Circuit, as well as this court. *See Voss Int'l Corp. v. United States,* 67 CCPA 96, 104–05, C.A.D. 1253, 628 F.2d 1328, 1334–35 (1980); *Toho Titanium Co. v. United States,* 14 CIT 500, 501–03, 743 F. Supp. 888, 890–91 (1990); *Mitsubishi Elec. Corp. v.*

United States, 12 CIT 1025, 1055, 700 F. Supp. 538, 561–62 (1988), *aff'd on other grounds,* 898 F.2d 1577 (Fed. Cir. 1990).

The sales which GE alleges were made outside of the period of review were made pursuant to two long-term contracts. GE had entered into these contracts with NTN Corporation ("NTN") prior to the period of review. In its questionnaire response in this review NTN reported dates of sale for these sales within the period of review. GE presented evidence to the ITA upon remand that showed that the dates of sale reported by NTN were in fact only the dates of amendments to the long-term contracts which did not change the material terms of the contracts. Therefore, GE alleges that the correct dates of sale for these imports are the dates on which GE and NTN entered into the long-term contracts. *Plaintiff's Memorandum* at 8–18.

GE argues that in the remand results the ITA changed its definition of date of sale to one requiring a showing that the terms of the long-term contracts were "irrevocably set" prior to the period of review in order for the sales not to be considered. *Id.* at 18–25 (*quoting Remand Results* at 5).

Torrington argues that GE failed to submit information which shows that the terms of sale for these long-term contracts were not subject to change during the period of review. Therefore, Torrington argues that the dates of the amendments to the long-term contracts reported by NTN as the dates of sale are the correct dates of sale. *Torrington's Opposition* at 2–6. Torrington also argues that the ITA verified NTN's sales data and that GE's information has not been verified. Therefore, the ITA should at a minimum be required to verify GE's submission and reconcile the conflict between the sales dates supplied by GE and NTN. *Id.* at 6–8. Finally, Torrington argues that 19 U.S.C. § 1675(a)(2) (1988) requires the ITA to calculate margins for all entries of AFBs which occurred during the period of review. Torrington points out that the entries at issue occurred during the period of review, therefore, the ITA is required to calculate some margin for them even if the ITA finds that the dates of sale were outside of the period of review. *Id.* at 9–10.

In response to Torrington, GE argues that the information it submitted is not inconsistent with the verified NTN data because the ITA's verification team never reviewed the underlying purchase orders and had no reason to question the dates of sale reported by NTN. GE also argues that verification of GE's data is not required by the statute and would be a waste of time because the ITA would simply look at the originals of the documents GE submitted on remand. *Reply of General Electric Company to Torrington Company's Response to GE's Memorandum in Opposition to Remand Issues* at 6–7.

In addition, GE points out that Torrington's concern that the entries of AFBs at issue in this case will escape the assessment of antidumping duties is misplaced because in this review the ITA

> reviewed sales rather than entries during the period of review, and therefore cannot derive duties on an entry-by-entry basis. Since

> units entered and units sold are almost identical in purchase price situations, we can collect a close approximation of the total dumping duty liability by calculating importer-specific per-unit amounts for sales during the period of review and applying those per-unit amounts to entries during the period.

Id. at 8–10 (*quoting Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From the Federal Republic of Germany; Final Results of Antidumping Duty Administrative Review*, 56 Fed. Reg. 31,692, 31,701 (1991)). Use of this methodology by the ITA will result in the assessment of the correct amount of antidumping duties on all of GE's entries of AFBs made during the period of review. *Id.*

This Court has examined the complete administrative record of this remand. Using the definition of date of sale contained in the ITA's questionnaire, the information submitted by GE clearly shows that the dates of sale for the entries in question are outside of the period of review. AR Japan Pub. Doc. 39; Remand Record Public Doc. 2. Removal of the sales made pursuant to these two long-term sales contracts from the calculation of the assessment rate on GE's entries will allow these duties to be correctly calculated. Use of the ITA's proposed assessment methodology will allow for the correct assessment of antidumping duties on all of GE's AFB entries which occurred within the period of review.

Also, the ITA is not required to verify all information upon which it relies in an administrative review. *See* 19 U.S.C. § 1677e(b)(3) (1988); *cf. Industrial Quimica Del Nalon, S.A. v. United States*, 14 CIT 143, 145, 732 F. Supp. 1180, 1182, *appeal denied*, 904 F.2d 44 (Fed. Cir. 1990); *Florex v. United States*, 13 CIT 28, 34, 705 F. Supp. 582, 589 (1989). In this case there is no conflict between verified information and non-verified information. While it is true that the ITA verified NTN's questionnaire response, the ITA verified NTN's reported sales dates based only on the information provided by NTN. ITA was not aware of the problem with the reported sales dates and did not look to the underlying documentation which has since been provided by GE. In addition, verification of GE's submission would entail sending an ITA verification team simply to look at the originals of the documents which GE has submitted and which the Court deems unnecessary.

Given that this Court finds that a second remand is necessary in this case and that the defendant consents to a second remand, this Court remands this case to the ITA to recalculate the antidumping duties to be assessed against GE's entries made during the period of review by excluding from the calculation of this assessment rate the eight sales identified by GE as occurring prior to the period of review. The ITA will report the results of this remand to this Court within fifteen (15) days of the entry of this opinion. Further, Torrington's motion to affirm the remand results is denied.

(Slip Op. 93–56)

NTN BEARING CORP. OF AMERICA AND NTN KUGELLAGERFABRIK (DEUTSCHLAND) GMBH, PLAINTIFFS *v.* UNITED STATES, DEFENDANT, AND TORRINGTON CO. AND FEDERAL-MOGUL CORP., DEFENDANT-INTERVENORS

Court No. 91–08–00576

Plaintiffs move pursuant to Rule 56.1 of the Rules of this Court for partial judgment on the agency record as to Count III of their complaint claiming that the Department of Commerce, International Trade Administration ("ITA"), erred in deducting direct selling expenses from U.S. price rather than adding such expenses to foreign market value. Defendant claims that this issue should be dismissed as moot since it affects deposit rates established during the first administrative review, which have now been superseded by the second administrative review.

Held: The Court adheres to its decision in *NSK Ltd. and NSK Corporation v. United States*, 17 CIT ____, Slip Op. 93–50 (April 2, 1993), and holds that plaintiffs' motion for partial judgment on the agency record is granted.

[Plaintiffs' motion for partial judgment on the agency record granted.]

(Dated April 21, 1993)

Barnes, Richardson & Colburn (*Robert E. Burke, Donald J. Unger, Kazumune V. Kano* and *Diane A. MacDonald*) for plaintiffs.

Stuart E. Schiffer, Acting Assistant Attorney General; *David N. Cohen*, Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Velta A. Melnbrencis*); of counsel: *Stephen J. Claeys*, Attorney-Advisor, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, for defendant.

Stewart and Stewart (*Eugene L. Stewart, Terence P. Stewart, James R. Cannon, Jr., John M. Breen* and *Margaret E.O. Edozien*) for defendant-intervenor The Torrington Company.

Frederick L. Ikenson, P.C. (*Frederick L. Ikenson, J. Eric Nissley, Larry Hampel* and *Joseph A. Perna, V*) for defendant-intervenor Federal-Mogul Corporation.

OPINION

TSOUCALAS, *Judge:* Plaintiffs, NTN Bearing Corporation of America and NTN Kugellagerfabrik (Deutschland) GmbH ("NTN"), move pursuant to Rule 56.1 of the Rules of this Court for partial judgment on the agency record as to Count III of their complaint claiming that the Department of Commerce, International Trade Administration ("ITA" or "Commerce"), erred in deducting direct selling expenses from U.S. price rather than adding such expenses to foreign market value.

The administrative determination under review is the ITA's final results in *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From Japan; Final Results of Antidumping Duty Administrative Reviews* ("*Final Results*"), 56 Fed. Reg. 31,754 (1991). Substantive issues raised by NTN in the underlying administrative proceeding were addressed by ITA in the Issues Appendix to *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From the Republic of Germany; Final Results of Antidumping Duty Administrative Review* ("*Issues Appendix*"), 56 Fed. Reg. 31,692 (1991).

BACKGROUND

On June 11, 1990, the ITA initiated an administrative review of ball bearings, cylindrical roller bearings, spherical plain bearings and parts thereof from Japan. *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From the Federal Republic of Germany, France, Italy, Japan, Romania, Singapore, Sweden, Thailand and the United Kingdom Initiation of Antidumping Administrative Reviews,* 55 Fed. Reg. 23,575 (1990). NTN participated in this review. *Id.*

On March 15, 1991, the ITA published its preliminary determination in the administrative review. *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof from Japan; Preliminary Results of Antidumping Duty Administrative Reviews and Partial Termination of Administrative Reviews,* 56 Fed. Reg. 11,186 (1991).

On July 11, 1991, the ITA published its Final Results in this proceeding. *Final Results,* 56 Fed. Reg. at 31,754. In its final results, Commerce deducted direct selling expenses from U.S. price in exporter's sales price transactions. *Issues Appendix* at 31,722–23. NTN claims that this was not in accordance with law. Commerce claims that this issue should be dismissed as moot since it affects deposit rates established during the first administrative review, which have been superseded by the second administrative review. *Defendant's Memorandum in Opposition to Plaintiffs' Partial Motion for Judgment Upon the Agency Record* at 2–6.

DISCUSSION

It is well-established that an "actual controversy must exist at stages of appellate or certiorari review, and not simply at the date the action is initiated." *See Roe v. Wade,* 410 U.S. 113, 125 (1973); *see also SEC v. Medical Comm. for Human Rights,* 404 U.S. 403, 407 (1972). The Court adheres to its decision in *NSK Ltd. and NSK Corporation v. United States,* 17 CIT ____, Slip Op. 93–50 (April 2, 1993), and holds that plaintiffs' motion for partial judgment on the agency record is not moot since the issue at hand is capable of repetition and has been evading review. Furthermore, Commerce was in error in deducting direct selling expenses from U.S. price. The law is clear on this issue and absent any other authority the Court will continue to hold that Commerce should have added such expenses to foreign market value. *Id.* at 5–7. Nevertheless, a remand to Commerce for recalculation would serve no purpose since it would affect only deposit rates and the deposit rates have been superseded by the second administrative review. *Id.* Commerce "is cautioned that they are to adhere to the law and to the decisions of the Court on this issue. If not, this Court will be compelled to order sanctions against the government and hold Commerce in contempt of court for repeatedly ignoring the well-established law." *Id.* at 6–7.

(Slip Op. 93–57)

FLORAL TRADE COUNCIL OF DAVIS, CALIFORNIA, PLAINTIFF *v.* UNITED STATES, DEFENDANT, AND ASOCIACION COLOMBIANA DE EXPORTADORES DE FLORES, ET AL., DEFENDANT-INTERVENORS

Consolidated Court No. 90–06–00290

[Rehearing granted; remanded.]

(Dated April 22, 1993)

Stewart & Stewart (*Eugene L. Stewart, Terence P. Stewart, James R. Cannon, Jr.* and *Amy S. Dwyer*), for plaintiff.

Stuart E. Schiffer, Acting Assistant Attorney General, *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Michael S. Kane*); *Patrick Gallagher*, Attorney Advisor, United States Department of Commerce, of counsel, for defendant.

Akin, Gump, Hauer & Feld, L.L.P. (*Patrick F.J. Macrory, Spencer S. Griffith* and *Lydia C. Lundstedt*) for defendant-intervenor, Flores Dos Hectareas.

Arnold & Porter (*Michael T. Shor* and *Susan G. Lee*) for defendant-intervenors, Asocolflores, et al.

OPINION

RESTANI, *Judge:* Defendant-intervenor, Flores Condor de Colombia ("Condor"), has moved for rehearing of the portion of the court's determination in *Floral Trade Council v. United States*, 16 CIT ____, Slip Op. 92–213 (Dec. 1, 1992) that specifically applies to it. Although Condor's rehearing request was based on matters that could have been raised with greater specificity before the court's original determination, the court determined it would rehear the issue, largely because both Condor and the government are responsible for confusing the issue. *See* Order of February 11, 1993.

To that end, the court received further briefing. The issue of concern is whether, in calculating cost of production for foreign market value purposes, the International Trade Administration ("ITA") of the Department of Commerce conducted this antidumping duty review in such a manner as to deny amortization treatment for preproduction costs, if such costs were expensed in the company's records. ITA could produce no evidence that it did so prior to the remand proceedings. In the remand proceedings, ITA denied amortization to three companies which stated that they used expensing rather than amortization in their ordinary business records.

The question of what ITA did in the original review with regard to preproduction costs of other parties remains a mystery. The court believes it is inappropriate to rely, as ITA requests, on testimony from ITA employees about what they believed they did. In all but the rarest cases, ITA's conduct must be judged solely on the record developed prior to the determination at issue. This is neither an unusual situation, nor do the interests of justice require further development of the record.

The problem here is that a number of companies appear to have expensed preproduction costs in certain business records, but may have

amortized them in other business records or even solely for purposes of their antidumping responses. For some of these companies, all sides appear correct and incorrect at the same time, because parts of the questionnaire responses seem to say different things. In any case, all of these companies received *amortization* treatment.

The underlying difficulty began when ITA misstated its policy in the Remand Results of May 5, 1992, to the effect that Oamortization of preproduction costs was not permitted *at all*. With a few bumps along the way, it finally amended that statement to indicate that for purposes of the review at issue amortization was allowed if it was the practice followed in the company's ordinary business records. As stated previously, this is by no means clear from the record. Of course, the whole policy has been abandoned for subsequent reviews and amortization is now preferred.

The court finds that there is no appropriate way to establish exactly what ITA's policy was for purposes of the original stages of the review. As amortization of preproduction costs is obviously now considered a fair and accurate way to calculate cost of production and Condor was denied this treatment while others seemingly in the same position received it, it should be granted the adjustment. While this may create some inconsistencies, it appears the fairest course of action to follow in this situation.

SO ORDERED. ITA will perform the recalculation within thirty days. If no objection to the calculation is filed within ten days thereafter, this matter will be concluded.

(Slip Op. 93–58)

NIPPON PILLOW BLOCK SALES CO., LTD. AND FYH BEARING UNITS U.S.A INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT, AND TORRINGTON CO. AND FEDERAL-MOGUL CORP., DEFENDANT-INTERVENORS

Court No. 91–08–00555

Plaintiff, Nippon Pillow Block Sales Co., Ltd. and FYH Bearing Units U.S.A., Inc. ("NPB"), challenges: (1) the Department of Commerce, International Trade Administration's ("ITA") determination that NPB failed the ITA's cost verification and (2) the ITA's use of best information otherwise available ("BIA") for NPB's dumping margin. In addition, if the Court remands this case back to the ITA, NPB requests the Court to instruct the ITA not to compare sales of dissimilar quantities of antifriction bearings when comparing home market and U.S. sales.

Held: The ITA's use of total BIA under the circumstances of this case was not supported by substantial evidence on the administrative record.

[Plaintiff's motion for judgment on the agency record granted; case remanded.]

(Dated April 23, 1993)

Tanaka & O'Leary (*H. William Tanaka, Michele N. Tanaka, Michael J. Brown* and *John J. Kenkel*) for plaintiff.

Baker & McKenzie (*Kevin M. O'Brien, Richard G. King* and *Joseph E. Downey*) Emerson Power Transmission Corporation, *amicus curiae* in support of plaintiff's motion.

Stuart E. Schiffer, Acting Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Velta A. Melnbrencis* and *Jane E. Meehan*); of counsel: *Stephen J. Claeys* and *Dean A. Pinkert*, Attorney-Advisors, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, for defendant.

Stewart and Stewart (*Eugene L. Stewart, Terence P. Stewart, James R. Cannon, Jr., Geert De Prest, John M. Breen, Patrick J. McDonough, Margaret L.H. Png* and *Amy S. Dwyer*) for defendant-intervenor The Torrington Company.

Frederick L. Ikenson, P.C. (*Frederick L. Ikenson, J. Eric Nissley* and *Joseph A. Perna, V*) for defendant-intervenor Federal-Mogul Corporation.

OPINION

TSOUCALAS, *Judge:* Plaintiff, Nippon Pillow Block Sales Co., Ltd. and FYH Bearing Units U.S.A., Inc. ("NPB"), commenced this action to challenge certain aspects of the Department of Commerce, International Trade Administration's ("ITA") final results in the first administrative review of imports of antifriction bearings ("AFBs") from Japan. *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From Japan; Final Results of Antidumping Duty Administrative Reviews* ("*Final Results*"), 56 Fed. Reg. 31,754 (1991). Substantive issues raised by the parties in the underlying administrative proceeding were addressed by the ITA in the issues appendix to *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From the Federal Republic of Germany; Final Results of Antidumping Duty Administrative Review* ("*Issues Appendix*") 56 Fed. Reg. 31,692 (1991).

In this proceeding NPB challenges: (1) the ITA's determination that NPB failed the ITA's cost verification and (2) the ITA's use of best information otherwise available ("BIA") for NPB's dumping margin. In addition, if the Court remands this case back to the ITA, NPB requests the Court to instruct the ITA not to compare sales of dissimilar quantities of AFBs when comparing home market and U.S. sales. *Memorandum in Support of Plaintiff's Motion for Judgment on the Agency Record Pursuant to USCIT Rule 56.1* ("*NPB's Memorandum*") at 15–93.

BACKGROUND

On June 11, 1990, the ITA initiated an administrative review of imports of ball bearings, cylindrical roller bearings, spherical plain bearings and parts thereof from Japan. *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From the Federal Republic of Germany, France, Italy, Japan, Romania, Singapore, Sweden, Thailand and the United Kingdom Initiation of Antidumping Administrative Reviews,* 55 Fed. Reg. 23,575 (1990). NPB participated in this review. Administrative Record Japan Public Document ("AR Japan Pub. Doc.") 9.

On March 15, 1991, the ITA published its preliminary determination in the administrative review. *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts thereof from Japan; Preliminary Results of Antidumping Duty Administrative Reviews and Partial Termination of Antidumping Duty Administrative Reviews* ("*Preliminary Results*"), 56 Fed. Reg. 11,186 (1991). In the Preliminary Results, the ITA assigned NPB a 54.54% margin for ball bearings. NPB's sales of cylindrical roller bearings and spherical plain bearings were not subject to this review. *Preliminary Results*, 56 Fed. Reg. at 11,189.

On July 11, 1991, the ITA published its *Final Results* in this proceeding. Final Results, 56 Fed. Reg. 31,754. The ITA assigned NPB a margin of 45.83% for ball bearings. *Id.* at 31,756.

During the course of this administrative review, NPB submitted cost of production and constructed value data for the types of AFBs which it sold in the home market.[1] AR Japan Pub. Doc. 443. The ITA had requested that NPB provide this data on a model-specific basis. However,

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[1] In an administrative review, the ITA is required to calculate "the foreign market value and United States price of each entry of merchandise subject to [an] antidumping duty order" and determine "the amount, if any, by which the foreign market value of each such entry exceeds the United States price of the entry." 19 U.S.C. § 1675(a)(2) (1988). 19 U.S.C. § 1677b(a) (1988) defines foreign market value:

> **(1) In general**
>
> The foreign market value of imported merchandise shall be the price, * * *
>
> (A) at which such or similar merchandise is sold * * * in the principal markets of the country from which exported * * *, or
>
> (B) if not so sold or offered for sale for home consumption, * * * then the price at which so sold or offered for sale for exportation to countries other than the United States,
>
> * * * * * * * *
>
> **(2) Use of constructed value**
>
> If the administering authority determines that the foreign market value of imported merchandise cannot be determined under paragraph (1)(A), then, notwithstanding paragraph (1)(B), the foreign market value of the merchandise may be the constructed value of that merchandise, as determined under subsection (e) of this section.

"Constructed value" is defined at 19 U.S.C. § 1677b(e) (1988):

> **(e) Constructed value**
>
> **(1) Determination**
>
> For the purposes of this subtitle, the constructed value of imported merchandise shall be the sum of—
>
> (A) the cost of materials * * * and of fabrication or other processing of any kind employed in producing such or similar merchandise * * *;
>
> (B) an amount for general expenses and profit equal to that usually reflected in sales of merchandise of the same general class or kind as the merchandise under consideration which are made by producers in the country of exportation * * *, except that—
>
> (i) the amount for general expenses shall not be less than 10 percent of the cost as defined in subparagraph (A), and
>
> (ii) the amount for profit shall not be less than 8 percent of the sum of such general expenses and cost; and
>
> (C) the cost of all containers and coverings of whatever nature, and all other expenses incidental to placing the merchandise under consideration in condition, packed ready for shipment to the United States.

The ITA requests cost of production data from respondents because it is necessary for the calculation of constructed value.

In addition, 19 U.S.C. § 1677b(b) (1988) requires that:

> **(b) Sales at less than cost of production**
>
> Whenever the administering authority has reasonable grounds to believe or suspect that sales in the home market * * * have been made at prices which represent less than the cost of producing the merchandise [and such sales]—
>
> (1) have been made over an extended period of time and in substantial quantities, and
>
> (2) are not at prices which permit recovery of all costs within a reasonable period of time in the normal course of trade
>
> such sales shall be disregarded in the determination of foreign market value * * * [and] the administering authority shall employ the constructed value of the merchandise to determine its foreign market value.

See also 19 C.F.R. §§ 353.50, 353.51 (1991).

in the ordinary course of its business NPB did not record its expenses on a model-specific basis but rather on an aggregate basis. Therefore, NPB reported its costs on an aggregate basis and developed a methodology for allocating these costs on a model-specific basis. *Id.*

On October 30, 1990, the ITA notified NPB that reasonable grounds existed to believe that NPB sold AFBs in the home market at below cost of production prices. AR Japan Pub. Doc. 451.

From December 17 to December 20, 1990, the ITA conducted verification of NPB's cost of production and constructed value data. AR Japan Pub. Doc. 658. The ITA verified all of the underlying factual data submitted by NPB, including: aggregate in-house labor costs, aggregate overhead and model-specific subcontracting costs. *Id.*

At verification, the ITA discovered that NPB's method for allocating in-house labor costs and overhead on a model-specific basis was based on the ratio of each model's subcontracting costs for outer ring turning, one of the production steps which occur when making the outer ring of a AFB, to that model's total subcontracting and material costs. *Id.* The ITA also discovered that some AFB production steps were being conducted by subcontractors for certain bearing models and that the same production steps were being conducted in-house for other bearing models. *Id.* The ITA concluded that the use of subcontracting costs as the basis for allocating in-house labor and overhead could lead to over- or under-allocation of these costs and, therefore, rejected NPB's allocation methodology for model-specific in-house labor and overhead. *Id.* The ITA requested NPB to develop an alternative allocation methodology. *Id.*

The ITA also had a problem with NPB's reported selling, general, and administrative expenses ("SG&A"). NPB reported SG&A for each model based on that model's cost of manufacture. The cost of manufacture included NPB's model-specific in-house labor and overhead costs, which the ITA had already rejected. While the ITA verified the accuracy of NPB's allocation methodology for SG&A, the ITA rejected NPB's reported SG&A because-the underlying data had been rejected. *Id.*

As a result of the ITA's inability to verify NPB's model specific in-house labor costs, overhead and SG&A expenses, the ITA determined in the Preliminary Results that NPB had failed verification and decided to apply a BIA rate as NPB's dumping margin. *Preliminary Results,* 56 Fed. Reg. at 11,186.

During the rest of the administrative review, NPB contended that its in-house labor costs, overhead and SG&A had been successfully verified by the ITA. If, however, the ITA continued to find that NPB had failed verification, NPB argued that the use of BIA in this situation was not warranted, offered alternative methods for allocating in-house labor costs and overhead which the ITA rejected, and suggested that the ITA develop an allocation methodology on its own or use BIA only for model-specific in-house labor and overhead. AR Japan Pub. Docs. 791, 843.

Defendant-intervenors, The Torrington Company ("Torrington") and the Federal-Mogul Corporation ("Federal-Mogul"), submitted comments supporting the ITA's use of a BIA rate as NPB's dumping margin. AR Japan Pub. Docs. 857, 866.

In the Final Results of this administrative review, the ITA explained its use of total BIA for firms which cooperated in the review as follows:

> 2. When a company substantially cooperated with our requests for information including, in some cases, verification, but failed to provide the information requested in a timely manner or in the form required, we have used as BIA the higher of: (1) The firm's LTFV rate for the subject merchandise (or the "all others" rate from the LTFV investigation, if the firm was not individually investigated), or (2) the highest calculated rate in this review for the class or kind of merchandise from the same country of origin.

Issues Appendix, 56 Fed. Reg. at 31,705.

The ITA's explanation of its use and choice of a BIA rate for NPB's dumping margin deserves to be quoted at length:

> We disagree with NPB's contention that its basic labor, overhead, selling, general and administrative expense data were successfully verified. Although we were able to tie the aggregate labor, overhead and SG&A expenses from the monthly trial balance to the audited financial statements, we were not able to tie the reported model-specific amounts for these items to those internal accounting records and financial statements. Verification depends precisely on tying amounts reported in questionnaire responses to the company's internal accounting records and financial statements. Failure to demonstrate such a relationship results in a failed verification. In Valves [Certain Valves and Connectors of Brass for Use in Fire Protection Systems from Italy, 55 FR 50342 (1990)] and Salmon [Final Determination of Sales at Less Than Fair Value; Fresh and Chilled Atlantic Salmon from Norway, 56 FR 7661 (1991)] minor reallocations based on financial statement data were accepted because the respondents' questionnaire responses reconciled to the internal accounting records and financial statements. Unlike Valves and Salmon, and TRBs [Tapered Roller Bearings Four Inches or Less in Outside Diameter and Certain Components Thereof from Japan; Final Results of Antidumping Duty Administrative Review, 55 FR 38720, 38728 (1990)] and Sweaters [Final Determination of Sales at Less Than Fair Value; Sweaters Wholly or in Chief Weight of Man-Made Fibre from Taiwan, 55 FR 34585 (1990)], where partial BIA was used to correct for minor omissions in the response, and Flowers [Certain Fresh Cut Flowers from Columbia; Final Results of Antidumping Duty Administrative Review, 55 FR 20491, 20494 (1990)] where such minor omissions did not result in rejection of the entire response, NPB failed verification, in this case, verification of costs. In accordance with Department practice and policy, a failed verification is sufficient grounds for rejecting a response and resorting to BIA.
>
> It is not the Department's policy to penalize respondents for not maintaining records in a manner that facilitates response to the an-

tidumping questionnaire. When NPB explained its cost accounting system to the Department at verification, the Department attempted to work with NPB to devise an appropriate allocation methodology based on that system. However, due to problems addressed herein, the Department was unable to devise such an appropriate methodology at verification.

* * * * * * *

The Department did attempt to make a more appropriate allocation for labor and overhead costs, but found that by doing so, it would have to ignore verified subcontracting costs. * * * We consider it inappropriate to accept reallocated data, for purposes of analysis, if applying that revised data would result in rejection of verified information.

The alternate allocation methodology for labor and overhead costs proposed by NPB in its prehearing brief (aggregate labor and overhead expenses allocated across aggregate material and subcontracting costs) would result in an under- or over-allocation of these items. The Department learned, at verification, that production steps performed by subcontractors are not the same for all models; therefore, models with the highest subcontracting costs would be allocated higher portions of the labor and overhead costs.

In cases where the Department has accepted cost allocations based on aggregate data, it has done so because the costs involved bore some relationship to each other, or because such costs allocations were appropriate given the companies, internal cost accounting systems. * * * Here, some disaggregated records were kept by NPB * * * [but] the Department was unable to devise an appropriate allocation methodology.

* * * * * * *

For the reasons discussed above, the Department was not able to conduct a test for sales below the cost of production. Thus, we were unable to use home market sales for comparison purposes. For the same reasons that NPB's data were unacceptable for the cost test, they were unacceptable for use in constructed value. Therefore, for this firm, we used as BIA the higher of the "all others" rate from the LTFV investigation or the highest weighted-average rate calculated for any individual firm in the instant review.

Id. at 31,707–08.

DISCUSSION

This Court's jurisdiction over this matter is derived from 19 U.S.C. § 1516a(a)(2) (1988) and 28 U.S.C. § 1581(c) (1988).

A final determination by the ITA in an administrative proceeding will be sustained unless that determination is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B) (1988). Substantial evidence is "relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison Co. v. NLRB,* 305 U.S. 197, 229 (1938); *Alhambra Foundry Co. v. United States,* 12 CIT 343, 345, 685 F. Supp. 1252, 1255 (1988).

Verification of information submitted by respondents and the use of BIA are governed by 19 U.S.C. § 1677e (1988) which states in relevant part:

> **(b) Verification**
>
> The administering authority shall verify all information relied upon in making–
>
> * * * * * * *
>
> (3) a review and determination under section 1675(a) of this title, if–
>
> (A) verification is timely requested by an interested party * * *, and
>
> (B) no verification was made under this paragraph during the 2 immediately preceding reviews and determinations under that section of the same order, finding, or notice, except that this clause shall not apply if good cause for verification is shown.
>
> * * * If the administering authority is unable to verify the accuracy of the information submitted, it shall use the best information available to it as the basis for its action * * *.
>
> **(c) Determinations to be made on best information available**
>
> In making their determinations under this subtitle, the administering authority and the Commission shall, whenever a party or any other person *refuses or is unable to produce information requested in a timely manner and in the form required, or otherwise significantly impedes an investigation,* use the best information otherwise available.

(Emphasis added); *see also* 19 C.F.R. §§ 353.36, 353.37 (1991).[2]

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[2] 19 C.F.R. § 353.36 states in relevant part:

§ 353.36 Verification of information.

(a) *In general.* (1) The Secretary will verify all factual information the Secretary relies on in:

* * * * * * *

(iv) The final results of an administrative review under § 353.22 (c) or (f) if the Secretary decides that good cause for verification exists; and

(v) The final results of an administrative review under § 353.22(c) if:

(A) An interested party * * * not later than 120 days after the date of publication of the notice of initiation of review, submits a written request for verification; and

(B) The Secretary conducted no verification under this paragraph during either of the two immediately preceding administrative reviews.

(2) If the Secretary decides that, because of the large number of producers and resellers included in an investigation or administrative review, it is impractical to verify relevant factual information for each person, the Secretary may select and verify a sample.

19 C.F.R. § 353.37 states in relevant part:

§ 353.37 Best information available.

(a) *Use of best information available.* The Secretary will use the best information available whenever the Secretary:

(1) Does not receive a complete, accurate, and timely response to the Secretary's request for factual information; or

(2) Is unable to verify, within the time specified, the accuracy and completeness of the factual information submitted.

(b) *What is best information available.* The best information available may include the factual information submitted in support of the petition or subsequently submitted by interested parties * * *. If an interested party refuses to provide factual information requested by the Secretary or otherwise impedes the proceeding, the Secretary may take that into account in determining what is the best information available.

1. *Failure of cost verification and use of BIA:*

NPB argues that all factual data supplied by NPB was verified by the ITA and that it is only NPB's allocation methodology for in-house labor and overhead which is questioned. *NPB's Memorandum* at 15–20; *Reply Memorandum* at 1–2; *see also Brief of Amicus Curiae Emerson Power Transmission Corporation in Support of Motion Under Rule 56.1 for Judgment Upon the Agency Record* ("*Emerson's Brief*") at 7–8. NPB argues that an allocation methodology is not factual information subject to verification. *NPB's Memorandum* at 34. NPB points out that its responses to the ITA's requests for information were submitted on time, were complete and that all of the factual data provided has been verified as accurate by the ITA. *Id.* at 33–34; *Emerson's Brief* at 7. As a result, NPB alleges that the ITA's determination that NPB failed the cost of production verification is incorrect. *NPB's Memorandum* at 33–34.

NPB also points out that the ITA used aggregate cost data from financial statements in this administrative review for certain respondents where their model-specific data could not be tied to their financial statements. *Id.* at 22–27. NPB argues that the ITA will use a respondent's costs as represented by the respondent's normal accounting records unless these costs are shown to be wrong. In this case nothing in the administrative record shows that NPB's data is wrong or that its proposed allocation methodology provided incorrect results. Therefore, NPB argues that its data should have been used by the ITA. *Id.* at 26.

Further, NPB argues that the ITA's failure to develop an allocation methodology on its own to replace NPB's proposed methodology was not in accordance with law. In addition, NPB contends that the ITA should have considered the alternative methodologies proposed by NPB at the public hearing or should have requested NPB to segregate subcontracting costs in its computer response so that NPB's original allocation methodology could be corrected. *Id.* at 46–51. NPB points out that in the past the ITA has accepted allocation methodologies less precise than the ones proposed by NPB in this administrative review. *Id.* at 53–54.

In regard to the ITA's use and choice of total BIA, NPB argues that the ITA has a longstanding policy of not using total BIA when rejecting a respondent's allocation methodology but instead of developing an allocation methodology on its own which incorporates the respondent's verified factual information. *NPB's Memorandum* at 27–33;[3] *Emerson's Brief* at 10–14.

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[3] Some of the administrative determinations which NPB cites in support of its position include: *Final Results of Antidumping Duty Administrative Review: Certain Iron Construction Castings From the People's Republic of China* ("*Iron Construction Castings*"), 57 Fed. Reg. 10,644, 10,647 (1992); *Notice of Final Results and Termination in Part of Antidumping Duty Administrative Review: 3.5" Microdisks and Coated Media Thereof From Japan* ("*Microdisks*"), 56 Fed. Reg. 58,040, 58,044 (1991); *Final Determination of Sales at Less Than Fair Value: Silicon Metal From Argentina* ("*Silicon Metal*"), 56 Fed. Reg. 37,891, 37,898 (1991); *Final Determination of Sales at Less Than Fair Value: Chrome-Plated Lug Nuts From Taiwan* ("*Lug Nuts*"), 56 Fed. Reg. 36,130, 36,132 (1991); *Certain Carbon Steel Butt-Weld Pipe Fittings From Taiwan; Final Results of Antidumping Duty Administrative Review* ("*Butt-Weld Pipe Fittings*"), 56 Fed. Reg. 20,187, 20,188 (1991); *Preliminary Results of Antidumping Duty Administrative Review: Certain Valves and Connections, of Brass, for Use in Fire Protection Systems from Italy* ("*Fire Protection Systems*"), 55 Fed. Reg. 50,342, 50,343 (1990); *Final Results of Antidumping Duty Administrative Review: Roller Chain, Other than Bicycle, From Japan* ("*Roller Chain*"), 55 Fed. Reg. 42,602, 42,603 (1990); *Final Determination of Sales at Less Than Fair Value; Sweaters Wholly or in Chief Weight of Man-Made Fiber From Taiwan* ("*Sweaters*"), 55 Fed. Reg. 34,585, 34,587, 34,589–91 (1990).

NPB also argues that the ITA was wrong to use BIA in this case because the information that the ITA asked for, model-specific in-house labor and overhead, did not exist. NPB contends that the ITA has been barred from using BIA in situations where the information requested does not exist. *NPB's Memorandum* at 35–38 (*citing Olympic Adhesives, Inc. v. United States*, 899 F.2d 1565, 1573–74 (Fed. Cir. 1990)); *Emerson's Brief* at 8–9.

NPB also suggests that the ITA could have used another respondent's data as BIA for model-specific in-house labor and overhead. *NPB's Memorandum* at 40–45.

Finally, NPB argues that the ITA's use of the "all others" rate from the LTFV investigation as BIA was not in accordance with law because such use was punitive citing *Olympic*, 899 F.2d at 1572. *Id.* at 70–78; *see Reply Memorandum* at 12–14; *Emerson's Brief* at 1417.

In addition, Amicus Curiae Emerson Power Transmission Corporation ("Emerson") in support of the plaintiff argues that the ITA's use of an automatic two tiered BIA test for NPB is in direct conflict with the Court of Appeals for the Federal Circuit's holding in *Rhone Poulenc, Inc. v. United States*, 899 F.2d 1185, 1190 (Fed. Cir. 1990). Specifically, Emerson argues that *Rhone Poulenc* requires that the ITA obtain and *consider* recent data in its determination of what constitutes BIA but that in this case the automatic application of the ITA's two tiered system prevented the ITA from considering the most recent data in regard to its choice of BIA for NPB. *Supplemental Brief of Emerson Power Transmission Corporation* at 5.

Defendant argues that the ITA has broad discretion to use BIA in situations where a respondent does not produce information requested by the ITA, even if that information is difficult to produce. *Defendant's Memorandum in Opposition to Plaintiff's Motion for Judgment Upon the Agency Record* ("*Defendant's Memorandum*") at 14. In this case, defendant and Torrington argue that the ITA was unable to verify the accuracy of NPB's allocation methodology and was unable to tie NPB's reported model-specific in-house labor and overhead costs produced by this methodology to NPB's internal accounting records and financial statements. *Id.* at 15–18; *The Torrington Company's Response to Plaintiff's Motion for Judgment on the Agency Record* ("*Torrington's Response*") at 18–20.

Defendant and Torrington argue that the ITA is not required to reconstruct a respondent's questionnaire response to meet ITA's requirements by providing an alternative allocation methodology where a respondent's proposed methodology has been rejected by the ITA. *Defendant's Memorandum* at 19–20; *Torrington's Response* at 21–22. Even so, in this case the ITA did attempt to develop an alternative methodology in concert with NPB but was unable to do so. *Defendant's Memorandum* at 21.

In addition, the ITA found that the alternative methodologies proposed by NPB would have either required the ITA to ignore verified in-

formation, perpetuated the original problem with NPB's methodology by continuing to rely on subcontracting costs in allocating in-house labor and overhead or were based on the existence of a relationship between the cost of materials and in-house labor for each AFB model which was not shown to exist. *Id.* at 22–28; *Federal-Mogul Corporation's Opposition to Plaintiff's Motion for Judgment on the Agency Record* ("*Federal-Mogul's Opposition*") at 21–23.

Defendant argues that NPB's reliance on *Olympic Adhesives,* 899 F.2d 1565, is misplaced because, unlike the respondent in *Olympic,* NPB did have the information requested by the ITA even though it was in aggregate form. It was NPB's choice of allocation methodology which forced the ITA to resort to BIA, not the non-existence of the information requested and, therefore, *Olympic* does not apply in this case. *Defendant's Memorandum* at 29–30.

Defendant and Torrington argue that since the ITA correctly determined that NPB failed verification, the ITA was required to resort to BIA and that the ITA enjoys broad discretion in its choice of BIA. *Id.* at 36–39 (*citing Rhone Poulenc,* 899 F.2d at 1190–91; *N.A.R., S.P.A. v. United States,* 14 CIT 409, 416, 741 F. Supp. 936, 942 (1990); *Chemical Prods. Corp. v. United States,* 10 CIT 626, 633–34, 645 F. Supp. 289, 295, *remand order vacated,* 10 CIT 819, 651 F. Supp. 1449 (1986)); *Torrington's Response* at 22.

Defendant also argues that the use of partial BIA to substitute for NPB's missing model-specific in-house labor and overhead expenses would have been contrary to prior court rulings and administrative practice. Defendant argues that partial BIA is used only in situations where very limited amounts of information are missing or incorrect or in a situation where another party not under the respondent's control refuses to provide information requested by the ITA. Defendant alleges that neither situation applies here. *Defendant's Memorandum* at 41–42. Defendant states that NPB's failure to substantiate its allocation methodology for in-house labor and overhead made its entire cost response unusable requiring the use of total BIA. *Id.* at 42–43; *cf. Federal-Mogul's Opposition* at 25–27.

Defendant, Torrington and Federal-Mogul argue that the ITA's choice of total BIA was reasonable and in accordance with law. Defendant, Torrington and Federal-Mogul point out that the ITA treats the BIA provision as embodying a rule of reasonable adverse inference, i.e., that compliance with the ITA's information request would have been more adverse to the respondent than noncompliance. *Defendant's Memorandum* at 44 (*citing Rhone Poulenc,* 899 F.2d at 1188–91); *Torrington's Response* at 22–25; *Federal-Mogul's Opposition* at 27–29. In assigning the "all others" rate which was NPB's rate from the underlying less than fair value investigation, the ITA ensured that NPB was not better off due to its noncompliance with the ITA's information request and encouraged NPB to cooperate fully with the ITA in future reviews. *Defendant's Memorandum* at 44–45. In addition, the ITA recognized

NPB's attempt to cooperate with the ITA by assigning NPB the lower or "second tier" BIA rate used for cooperating respondents. *Defendant's Memorandum* at 45–46; *Torrington's Response* at 25–27. Defendant points out that NPB's argument that the BIA used should be based on the most current accurate information was specifically rejected by the Court of Appeals for the Federal Circuit in *Rhone Poulenc,* 899 F.2d at 1190. *Defendant's Response* at 46.

Finally, Federal-Mogul points out that NPB could have used one of the allocation methodologies used by the other respondents but chose not to do so. *Federal-Mogul's Opposition* at 18–21.

In reviewing the ITA's decision to resort to the use of BIA, this Court examines two distinct aspects of that decision. The first aspect of the decision to be examined is whether there is substantial evidence on the administrative record of non-compliance by a respondent with an information request from the ITA which supports the ITA's resort to the use of total or partial BIA and whether the respondent was put on notice that failure to comply with the ITA's information request would result in the use of adverse BIA. This entails an examination of the facts and administrative record of each case to determine if the ITA's actions are reasonable based upon the evidence in the administrative record and to determine if the respondent was put on notice.

If the court finds that the ITA's decision to resort to total or partial BIA is supported by substantial evidence on the administrative record and in accordance with law, the court must then determine if the ITA's choice of BIA accomplishes the purposes of the BIA rule as interpreted by the Court of Appeals for the Federal Circuit in *Rhone Poulenc* which is to induce respondents to provide the ITA with the information that it has requested in a timely, complete and accurate manner so that the ITA may "determin[e] current margins as accurately as possible" within the statutory deadlines. 899 F.2d at 1190–91. In order to accomplish this purpose, in situations where the ITA uses BIA as the partial or total dumping margin, the ITA makes a rebuttable presumption "that the highest prior margin is the most probative evidence of current margins because, if it were not so, the importer, knowing of the rule, would have produced *current* information showing the margin to be less." *Id.* at 1190 (emphasis in original).

Using the framework of analysis outlined above, this Court finds that substantial evidence on the administrative record supports the ITA's concerns with regard to NPB's proposed allocation methodology for model-specific in-house labor and overhead. An allocation methodology is part of the factual information submitted by a respondent which is subject to verification pursuant to 19 U.S.C. § 1677e(b) and failure to verify submitted information justifies the ITA's resort to the use of BIA. *Florex v. United States,* 13 CIT 28, 33, 705 F. Supp. 582, 588 (1989).

In this case, use of NPB's proposed methodology could lead to over- or under-allocation of model-specific in-house labor and overhead because under this methodology AFBs with greater subcontracting expenses

would receive proportionately more in-house labor and overhead expense. This would be acceptable if the types of production steps done by subcontractors were the same for all AFB models, but upon verification the ITA discovered that they were not. AR Japan Pub. Doc. 658.

Given that NPB's reported model-specific in-house labor and overhead expenses were correctly rejected by the ITA as not verified, it was also necessary for the ITA to reject NPB's reported SG&A since this amount was derived from a cost of manufacture which included the erroneous in-house labor and overhead expenses. *Id.* However, it bears repeating that the ITA's problem was only with the proposed allocation methodology and not with the underlying data which was successfully verified. *Id.*

NPB argued in its *Reply Memorandum* and stated at oral argument that the same production steps were done by subcontractors for all unhoused AFB models which were produced during the period of review. As a result, NPB argues that the ITA's concerns in regard to NPB's proposed allocation methodology do not exist for NPB's unhoused AFBs. Therefore, at a minimum, the ITA should be required to accept NPB's cost submission in regard to unhoused AFBs and use it instead of BIA to calculate dumping margins for unhoused AFBs. *Reply Memorandum* at 10–11; Transcript of Oral Argument (Nov. 13, 1992) at 12–15.

However, this Court can find no evidence in the administrative record that this argument was presented to the ITA during the administrative proceeding below. In fact, NPB does not even raise this argument before this Court until its reply brief. Therefore, this Court refuses to consider this argument. 28 U.S.C. § 2637(d) (1988); *Sharp Elecs. Corp. v. United States,* 13 CIT 732, 736, 720 F. Supp. 1014, 1017 (1989); *Matsushita Elec. Indus. Co. v. United States,* 12 CIT 455, 461–62, 688 F. Supp. 617, 622 (1988); *Cementos Guadalajara, S.A. v. United States,* 12 CIT 307, 330, 686 F. Supp. 335, 352–53 (1988), *aff'd,* 879 F.2d 847 (Fed. Cir. 1989), *cert. denied,* 494 U.S. 1016 (1990).

Having found that NPB had failed the cost verification in regard to the allocation methodology for model-specific in-house labor and overhead and by extension for SG&A, the ITA was required by 19 U.S.C. § 1677e(b) to resort to the use of BIA. The central question in this case is whether the ITA's decision to reject all of NPB's cost submission and use total BIA, instead of using partial BIA by applying its own allocation methodology or using another similarly situated respondent's allocation methodology, was supported by substantial evidence on the administrative record and in accordance with law.

In this case, this Court finds that the ITA's resort to total BIA is not supported by substantial evidence on the administrative record or by the ITA's past practice in similar cases.

After close examination of the administrative record in this case, the only explanation this Court can find relating to the ITA's decision not to

use partial BIA and to resort to total BIA is in the *Issues Appendix* which states:

> Although we were able to tie the aggregate labor, overhead and SG&A expenses from the monthly trial balance to the audited financial statements, we were not able to tie the reported model-specific amounts for these items to those internal accounting records and financial statements. Verification depends precisely on tying amounts reported in questionnaire responses to the company's internal accounting records and financial statements. Failure to demonstrate such a relationship results in a failed verification. In Valves [Certain Valves and Connectors of Brass for Use in Fire Protection Systems from Italy, 55 FR 50342 (1990)] and Salmon [Final Determination of Sales at Less Than Fair Value; Fresh and Chilled Atlantic Salmon from Norway, 56 FR 7661 (1991)] minor reallocations based on financial statement data were accepted because the respondents' questionnaire responses reconciled to the internal accounting records and financial statements. Unlike Valves and Salmon, and TRBs [Tapered Roller Bearings Four Inches or Less in Outside Diameter and Certain Components Thereof from Japan; Final Results of Antidumping Duty Administrative Review, 55 FR 38720, 38728 (1990)] and Sweaters [Final Determination of Sales at Less Than Fair Value; Sweaters Wholly or in Chief Weight of Man-Made Fibre from Taiwan, 55 FR 34585 (1990)], where partial BIA was used to correct for minor omissions in the response, and Flowers [Certain Fresh Cut Flowers from Columbia; Final Results of Antidumping Duty Administrative Review, 55 FR 20491, 20494 (1990)] where such minor omissions did not result in rejection of the entire response, NPB failed verification, in this case, verification of costs. In accordance with Department practice and policy, a failed verification is sufficient grounds for rejecting a response and resorting to BIA.

56 Fed. Reg. at 31,707.

Nowhere in this discussion or anywhere else in the administrative record can the Court find an explanation as to why the ITA believes that NPB's failure to provide an acceptable allocation methodology in this case is a major omission given the ITA's past administrative practice in similar situations of using partial BIA.

In the past this Court has upheld the use of total BIA by the ITA in situations where the ITA was unable to verify major portions of the information submitted by a respondent. *Chinsung Indus. Co. v. United States,* 13 CIT 103, 106–07, 705 F. Supp. 598, 601–02 (1989); *Ceramica Regiomontana, S.A. v. United States,* 10 CIT 399, 406, 636 F. Supp. 961, 967 (1986). However, in this case the ITA was unable to verify only NPB's proposed allocation methodology for in-house labor and overhead. This was not a case where a respondent's questionnaire responses "contained numerous omissions, allocation errors, oversights and miscalculations." *Chinsung,* 13 CIT at 106, 705 F. Supp. at 601. In addition, in the past the ITA had a consistent administrative practice of using par-

tial BIA in situations where the ITA rejected a respondent's allocation methodology.

For instance, in *Butt-Weld Pipe Fittings,* the ITA used its own methodology as BIA for reallocating company-wide direct labor and factory overhead. 56 Fed. Reg. at 20,188. In *Silicon Metal,* the ITA rejected the respondent's proposed allocation methodology for factory overhead and used as BIA a different methodology proposed by the petitioner in that proceeding. 56 Fed. Reg. at 37,898. In *Sweaters,* the ITA rejected various respondents' methods of allocating general and administrative expenses, interest expenses and home market selling expenses over cost of manufacturing and reallocated these expenses over cost of sales. 55 Fed. Reg. at 34,589–91, 34,595–99. *See, e.g., Microdisks,* 56 Fed. Reg. at 58,044 (ITA used "as BIA the ratio of Memorex's general and administrative expenses to cost of sales as reported on its financial statements and applied this ratio to the reported COM"); *Lug Nuts,* 56 Fed. Reg. at 36,132 (ITA rejected respondent's proposed allocation methodology for labor costs and used its own).

The ITA's justification for rejecting NPB's entire submission because it was unable to tie NPB's "reported model-specific amounts for these items to * * * internal accounting records and financial statements" is misleading because if NPB's allocation methodology was inaccurate, then by necessity the reported figures derived from that methodology would be inaccurate and incapable of being tied to the records. *Issues Appendix,* 56 Fed. Reg. at 31,707.

In addition, throughout the administrative review, the ITA determined that NPB was fully cooperating and that all the information requested by the ITA had been submitted on time and was accurate with the exception of the allocation methodology. The ITA's *Preliminary Results* stated "because of the level of cooperation exhibited by company officials at verification and because the company's response and verification were otherwise adequate, we are not using the most adverse BIA." 56 Fed. Reg. at 11,186; *see also Issues Appendix,* 56 Fed. Reg. at 31,705; AR Japan Pub. Doc. 744.

The purpose underlying the ITA's use of the BIA rule is to encourage respondents to provide the ITA with the information that it has requested in a timely, complete and accurate manner so that the ITA may "determin[e] current margins as accurately as possible" within the statutory deadlines. *Rhone Poulenc,* 899 F.2d at 1190–91. However, this purpose can be undermined when, as here, the ITA uses total BIA for a respondent who has cooperated in every way but is unable to provide the ITA with an acceptable allocation methodology due to the way it keeps its business records.

Given the lack of evidence in the administrative record explaining why the ITA determined that, contrary to past administrative practice, rejection of an allocation methodology constituted a complete failure of verification when all other information supplied was verified and that such a failure of verification justified resort to total BIA, coupled with

the admitted complete cooperation of the respondent in all phases of this administrative review, this Court finds that the ITA's use of total BIA for NPB was not supported by substantial evidence on the administrative record. Therefore, this case is remanded to the ITA to further explain why the ITA chose to ignore its past administrative practice of supplying its own allocation methodology in similar situations, or of using the allocation methodology of another respondent whose method of record keeping was similar to NPB's, as partial BIA for NPB's model-specific in-house labor and over head.

2. *Comparison of sales of dissimilar quantities:*

If the Court decides to remand this case back to the ITA, NPB requests that this Court order the ITA not to compare sales of dissimilar quantities of AFBs when comparing home market and U.S. sales. *NPB's Memorandum* at 89–92.

Defendant, Torrington and Federal-Mogul argue that this issue is not ripe for review because as yet the ITA has made no comparisons of any of NPB's home market and U.S. sales. *Defendant's Memorandum* at 47–48; *Torrington's Response* at 33–36; *Federal-Mogul's Opposition* at 29–31.

This court has stated that the administering agency must have the first opportunity to address an issue before it will be reviewed by this court. 28 U.S.C. § 2637(d); *Sharp Elecs.*, 13 CIT at 736, 720 F. Supp. at 1017; *Matsushita Elec.*, 12 CIT at 461–62, 688 F. Supp. at 622; *Cementos Guadalajara*, 12 CIT at 330, 686 F. Supp. at 352–53. As this issue has not yet been addressed by the ITA, this Court declines to deal with it at this time.

Conclusion

This case is remanded to the ITA to further explain why the ITA chose to ignore its past administrative practice of supplying its own allocation methodology in similar situations, or of using the allocation methodology of another respondent whose method of record keeping was similar to NPB's, as partial BIA for NPB's model-specific in-house labor and overhead. The ITA will report the results of this remand to this Court within thirty (30) days of the date this opinion is entered. Comments or responses by the parties to the remand results are due within thirty (30) days thereafter and any rebuttal comments are due within fifteen (15) days of the date responses or comments are due.

ABSTRACTED CLASSIFICATION DECISIONS

DECISION NO. DATE JUDGE	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
C93/42 4/20/93 Musgrave, J.	Transflock, Inc.	89–05–00272	256.87 5.6%	273.75 7¢ per lb.	Agreed statement of facts	San Francisco and Buff-Niag Falls, NY Transfer flock decals
C93/43 4/20/93 Musgrave, J.	Transflock, Inc.	91–07–00525	256.87 5.6%	273.75 7¢ per lb.	Agreed statement of facts	San Francisco Transfer flock decals

ABSTRACTED VALUATION DECISIONS

DECISION NO. DATE JUDGE	PLAINTIFF	COURT NO.	VALUATION	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
V93/9 4/20/93 Musgrave, J.	Thom Mc An	92-02-00092	Not stated	Entered value less additional duties and interest paid Rectification of error as to date of entry from May 11, 1984 to March 11, 1980 with claims abandoned by plaintiff regarding that entry	Nunn Bush Shoe Co. *v.* United States 784 F. Supp. 892 (CIT 1992) Amendment of stipulated judgment under Rule 59(e)	New York Footwear

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